155-173

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~387~~. 90

JAMES H. LINFORD, JR., APPELLANT,

vs.

EPHRAIM P. ELLISON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED FEBRUARY 21, 1891.

(14,489.)

(14,489.)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Answer	2	1
Findings of fact	4	3
Conclusions of law	6	4
Judgment	6	4
Notice of appeal	7	5
Agreement as to record on appeal	8	5
Exhibit 1—Map	8*a*	5
Hearing and submission	9	6
Judgment	9	6
Allowance of appeal	10	6
Findings of fact	11	6
Opinion	14	7
Bond on appeal	17	9
Clerk's certificate	19	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 27, 1894.

a File No., 139.

In the Supreme Court of Utah Territory.

EPHRAIM P. ELLISON, Respondent,
vs.
JAMES H. LINFORD, JR., Appellant.

Transcript and Abstract on Appeal.

J. L. Rawlins, attorney for appellant.
Arthur Brown, Sutherland & Judd, attorneys for respondent.

Marked: Filed in the supreme court at Salt Lake City, Utah, Nov. 25, 1890.

JOS. P. BACHE, *Clerk.*

1 In the District Court of the Third Judicial District of the Territory of Utah.

EPHRAIM P. ELLISON, Plaintiff,
vs.
JAMES H. LINFORD, JR., Defendant.

Said plaintiff complains of said defendant and alleges:

That on or about the 17th day of December, 1889, at Layton, in the county of Davis, in Utah Territory, said defendant unlawfully took from the possession of the plaintiff and carried away one wagon of the property of said plaintiff, of the value of seventy-five dollars ($75), and still unlawfully detains the same from said plaintiff to the damage of the plaintiff of one hundred dollars ($100).

Wherefore the plaintiff demands judgment for the sum of one hundred dollars, the damage aforesaid, and costs of this action.

SUTHERLAND & JUDD,
ARTHUR BROWN,
Plaintiff's Attorneys.

(Duly verified.)

Complaint filed December 26th, 1889.

HENRY G. McMILLAN, *Clerk.*

2 (Title.)

For answer to the complaint herein said defendant denies that at any time or place said defendant unlawfully took from the possession of the plaintiff, or carried away, one wagon, the property of plaintiff, or that said wagon was of any value exceeding twenty-five dollars, or that said defendant still or at all unlawfully detains the same from said plaintiff to his damage of one hundred dollars or any other sum.

For a further answer defendant alleges:

That Kaysville City is, and at all times hereinafter mentioned has been a municipal corporation, duly organized under the laws of

this Territory, and said defendant is and has been the duly elected, qualified and acting assessor and collector of said city.

That on the 12th day of December, 1889, said defendant as such assessor and collector, in accordance with the statutes in such case made and provided, and the provisions of chapter XVI of the "Revised Ordinances" of said Kaysville City, passed April 1st, 1889, it having been ascertained that taxable property of said plaintiff in said city had not been assessed at the regular assessment in said year, duly assessed said property to said plaintiff, and made a report thereof to the city council of said Kaysville City, and said council then and there caused the same to be entered in the collector's roll for collection.

That thereupon the recorder of said city, in accordance with the rate per cent. of city tax for said year previously and duly determined by said city council, set the amount, in the proper column opposite the name of said plaintiff, and description of said property in said roll, the amount of said tax being four and $\frac{5}{100}$ dollars, and then and there furnished said roll to said defendant, as assessor and collector, as aforesaid.

That on the 13th day of December, 1889, said defendant, as collector as aforesaid, furnished said plaintiff by mail, postage
3 prepaid, a notice of the amount of said tax assessed against him, and where and when payable, and thereupon returned said roll to the city council, and on the day last aforesaid, by direction of said council, due and personal notice was given to said plaintiff that said council would sit as a board of equalization on the 16th day of December, 1889, and would then hear and determine any complaint made by plaintiff in regard to the assessed value of his property as aforesaid, or otherwise.

That, in pursuance of said notice, on the said 16th day of December, 1889, said council met and was sitting as such board of equalization, but no complaint having been made as aforesaid, by said plaintiff, and said council finding said assessment in all respects regular, just and equitable, then and there confirmed the same, and then and there directed said roll to be delivered to defendant as such collector, for the collection of said tax.

That thereupon, on the 17th day of December, 1889, said defendant, as collector as aforesaid, pursuant to law and in accordance with the provisions of said ordinances, demanded of plaintiff the payment of said tax, which plaintiff then and there refused to make.

That thereafter, on said date, after such demand and refusal, said defendant as such collector, levied upon and took possession of the wagon mentioned in the complaint, the same being then and there taxable property of said plaintiff.

That thereupon, the same day, said defendant, as such collector, gave plaintiff notice in writing of such levy, and that he would sell said wagon, or so much thereof as was necessary to pay said taxes and costs, at public auction, in front of the city hall in said Kaysville City, on the 28th dayof December, 1889, at 12 o'clock m., on said day. Said defendant, as such collector, also caused eleven days' public notice to be given of the said time and place and kind of

property to be sold, by posting up said notice in three public places in the vicinity.

4 That, thereafter, on the said 28th day of December, 1889, pursuant to said notices, and at the time and place, and in the manner therein specified, said defendant, as such collector, for the purpose of making and collecting said taxes and costs, said plaintiff having utterly failed, neglected and refused to pay the same or any part thereof, sold said wagon at public auction and applied the proceeds of the sale in the payment of said taxes and costs, as by law and said ordinances directed.

That the foregoing and none other are the acts complained of in said complaint.

Wherefore said defendant prays to be hence dismissed with his costs.

J. L. RAWLINS,
Attorney for Defendant.

(Duly verified.)

Endorsements: Answer. Service of copy admitted January 23d, 1890. Sutherland & Judd, attorneys for plaintiff. Filed January 23d, 1890. Henry G. McMillan, clerk.

(Title.)

Findings.

Said cause came on for hearing on the 10th day of October, 1890, the plaintiff being represented by Sutherland & Judd and Arthur Brown; the defendant by Jos. L. Rawlins.

On said cause being called for trial the following stipulation of fact was made, which I hereby find as the facts in said case, to wit:

"We have agreed that that map before your honor, marked "Exhibit 1," correctly shows the outlines of the corporate city of Kaysville, as described in the statute incorporating the city. That the block part indicated upon the map shows the thickly settled

5 portions of the city, which is platted into lots and blocks, and marked "city lots."

That Mr. Ellison, the plaintiff in this case, resides upon the land outside of the platted part—agricultural lands, where his name appears, and he owns the number of acres as appears upon the map, and part of section that there appears; and also owns a store at the point indicated by the letters "F. U." and "E. P. U.," at a little place called Layton.

That the city of Kaysville levied a regular municipal tax for city purposes upon all of the premises bounded within the corporate limits as described by the statute, and put it in the hands of its proper officer for collection. That that officer levied upon the property of Mr. Ellison, who had refused to pay his tax—the property described in the complaint, and sold it for the payment of the taxes; which was a wagon worth fifty dollars. The plaintiff claims that the tax is illegal, and the defendant claims it is legal.

No question arises as to the regularity of the tax, or the propriety

of the officer in levying upon any property to pay it, provided a municipal tax could be levied upon the property of Mr. Ellison, situated as it is.

That the lands occupied by Mr. Ellison are agricultural lands, and used for farming purposes.

It is stipulated that the book presented here contains the revised ordinances of Kaysville, and that either party may refer to any ordinance therein to be found, applicable to the case.

The COURT: Do I understand, then, that you waive a jury in this case?

Mr. JUDD: Yes.

Mr. RAWLINS: Yes, we waive a jury, and will submit the case upon the stipulation of facts as made.

It would appear, although not expressly stated, that Mr. Linford, the defendant, is the marshal, or collecting officer of the city. The argument was made upon that basis, and I therefore find that as a fact also.

6 *Conclusions of Law.*

From the foregoing stipulations of fact, I draw the following conclusions of law:

1. That the organization of the city of Kaysville, including large quantities of agricultural lands which, at the time of its organization could not be benefited by municipal government, was, at the time thereof, illegal and void, and that it now is illegal and void as to the lands which cannot by any possibility be benefited by municipal government.

2. That to impose tax upon such lands is contrary to that part of the Constitution which provides that private property shall not be taken for public purposes without just compensation.

3. The lands of this plaintiff being agricultural lands, I hold that to tax him would be to take his property without just compensation.

I therefore hold, that the city of Kaysville had no authority to tax the lands and property of Mr. Ellison for municipal purposes.

The value of the property so illegally taken being fixed in the stipulation at fifty dollars, I therefore direct that judgment be rendered for the plaintiff for fifty dollars, and costs of suit to be taxed.

C. S. ZANE, *Judge.*

Endorsements: Findings of fact and conclusions of law. Filed October 21st, 1890. Henry G. McMillan, clerk.

(Title.)

This cause came on regularly for trial on the 14th day of October, A. D. 1890, J. W. Judd and Arthur Brown appearing as counsel for the plaintiff, and J. L. Rawlins for the defendant. A trial by jury having been expressly waived by the counsel for the
7 respective parties, the cause was tried before the court, sitting without a jury, whereupon the case is heard and tried upon

an agreed and stipulated state of facts in the case and the agreements of counsel, and the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that said plaintiff do have and recover of and from said defendant the sum of fifty dollars, with interest thereon at the rate of eight per cent. per annum from the date thereof until paid, together with plaintiff's costs on this behalf expended, and taxed at the sum of fifty-nine dollars and twenty-five cents.

Judgment rendered October 21st, A. D. 1890.

Filed October 21st, 1890.

HENRY G. McMILLAN, *Clerk.*

(Title.)

Please take notice that said defendant hereby appeals from the judgment made and entered in said district court on the 21st day of October, 1890, in favor of said plaintiff and against said defendant, to the supreme court of Utah Territory.

J. L. RAWLINS,
Attorney for Defendant.

To Sutherland & Judd, and Arthur Brown, attorneys for plaintiff.

Dated October 27th, 1890.

Endorsements: Notice of appeal. Filed October 27th, 1890. Henry G. McMillan, clerk. Received copy of within October 27th, 1890. Arthur Brown, attorney for plaintiff.

S. TERRITORY OF UTAH, } ss.:
Salt Lake County, }

It is hereby certified and agreed that the foregoing is a full, true and correct transcript of the record upon appeal in said cause, and that an undertaking in due form has been properly filed.

Original map, Exhibit 1, may be used.

———,
Attorney for Appellant.
SUTHERLAND & JUDD,
ARTHUR BROWN,
Attorneys for Respondent.

(Here follows map marked p. 8a.)

9 In the Supreme Court of the Territory of Utah, January Term, 1891.

EPHRAIM P. ELLISON, Respondent,
vs.
JAMES H. LINFORD, JR., Appellant.

THURSDAY, *January 15th*, 1891.

This cause, coming on regularly to be heard, was argued by J. L. Rawlins, Esq., for appellant; by John W. Judd and Arthur Brown, Esq., in reply; was submitted and taken under advisement.

WEDNESDAY, *February 4th*, A. D. 1891.

EPHRAIM P. ELLISON, Respondent,
vs.
JAMES H. LINFORD, JR., Appellant.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court
10 therein be, and the same is hereby, affirmed, and that respondent have and recover of and from appellant his costs incurred herein, to be taxed as provided by law.

Thereupon counsel for appellant prays the allowance of an appeal from the judgment rendered herein to the Supreme Court of the United States, in open court, counsel for respondent being present, and it was ordered that said appeal be, and is hereby, allowed, and the penal sum of a bond to be given thereon be, and is hereby, fixed at $500.00.

11 In the Supreme Court of the Territory of Utah, January Term, 1891.

EPHRAIM P. ELLISON, Respondent,
vs.
JAMES H. LINFORD, JR., Appellant.

WEDNESDAY, *Feby 4*.

Now comes the court and makes and files the following findings of fact to accompany the record in this case on appeal to the Supreme Court of the United States:

First. That the defendant, James H. Linford, Jr., was the legal and acting collector of taxes for the city of Kaysville at the time of the transaction out of which this action arose.

Second. That the city of Kaysville was a duly and legally organized municipal corporation under the laws of the Territory of Utah, and in pursuance of ordinances duly passed assessed and levied a regular municipal tax for city purposes upon all the premises and property within its corporate limits.

That, the tax levied upon the property of plaintiff not being paid and having become delinquent, the defendant, in pursuance of authority conferred by the ordinances of the city, levied upon a wagon

belonging to the plaintiff of the value of fifty dollars and sold it to satisfy said taxes.

Third. That the map or plat of the city of Kaysville, which was a part of the record and marked "Exhibit I," correctly shows
12 the *the* boundaries of the city and the location of the several tracts of plaintiff's land and of his store with reference to the platted and settled portion of the said city, and that the portion of the city which is platted into lots and blocks and marked "city lots," as shown on said map, correctly shows the thickly settled portions of said city and the only part thereof which is laid off into blocks and lots with streets and alleys.

Fourth. That plaintiff owns the three tracts of land where his name appears on the map, and that they are agricultural lands, used for farming purposes only, and on which he resides, and that he also owns a store at the point indicated by the letters "F. U." and "E. P. E." at a little place called Layton; that one of said tracts of land is situated a little over half a mile from the nearest part of the platted portion of the city. The second tract is situated about one mile and the third tract about two miles from the platted portion of the city, while the store is situated about two miles away, at a little place called Layton, on a county road leading to the city proper, and also on the line of the Utah Central railroad.

Fifth. That the city of Kaysville was incorporated by an act of the Legislative Assembly of Utah Territory passed March 15th, 1868, and contains about six hundred inhabitants in the platted portion thereof, and that it contains within its corporate limits more than twenty-three square miles.

Sixth. It is not shown that the platted and settled portion of the city or what may be termed the city proper is likely to be
13 extended in the direction of plaintiff's premises, nor that any streets, driveways, or other improvements in that direction are contemplated or are likely to be made, nor that the plaintiff will receive any benefit from the expenditures of the taxes for city purposes.

(Signed) THOS. J. ANDERSON, *J.*
" JOHN W. BLACKBURN, *J.*
" JAS. A. MINER, *J.*

Dated Feb'y 4th, 1891.

14 In the Supreme Court of the Territory of Utah.

EPHRAIM P. ELLISON, Respondent, *vs.* JAMES H. LINFORD, JR., Appellant. } Appeal from 3rd District. C. S. Zane, Judge.

ANDERSON, *J.*:

The defendant, as tax-collector of the city of Kaysville, levied upon and sold a wagon belonging to plaintiff for unpaid municipal taxes levied by said city upon his property. The plaintiff brought this action against the defendant to recover damages

for the taking and selling said property upon the ground that the taxes were illegal for the reason that the property on which the taxes were levied was not liable to taxation for city purposes, being situated outside the platted and settled portions of the city and so remote therefrom as to receive no benefit from the expenditure of the taxes for municipal purposes.

The defendant, by his answer, admitted the seizure and sale of the plaintiff's property as alleged, but claimed that the taxes for which it was taken were legal. The cause was tried to the court without a jury upon an agreed statement of facts. The court held the tax invalid and gave judgment in favor of the plaintiff for $50 and costs, and the defendant brings this appeal from said judgment.

From a plat of the city showing its corporate limits, the
15 platted and settled portion thereof, and the location of plaintiff's premises, which plat is made a part of the record, and from the agreed statement of facts it appears that the property of plaintiff on which the taxes were levied and on which he resides consists of three tracts of land used for farming purposes and a store, all within the corporate limits of the city. One tract is situated a little over half a mile from the nearest part of the platted portion of the city. The second tract is situated about one mile and the third tract about two miles from the platted portion of the city, while the store is situated about two miles away, at a little place called Layton, on a county road leading to the city proper, and also on the line of the U. C. railroad. This so-called "city" is only a small village, containing about six hundred inhabitants in the platted portion thereof, and yet its corporate limits include more than twenty-three square miles. It is not shown that the platted and settled portion or what may be termed the city proper is likely to be extended in the direction of plaintiff's premises, nor that any streets, driveways, or other improvements in that direction are contemplated or at all probable, nor is it shown that plaintiff will or can derive any benefit from the expenditure of these taxes except in that general sort of way in which it may be said that all persons residing in the country are benefitted by good streets, sidewalks, etc., in the town or city where they usually go to transact their business, but this kind of benefit is too slight to make it equitable or just that their property situated in the country should be taxed for city purposes.

16 The questions involved in this case were fully considered and elaborated by this court in the case of People *vs.* Danials, 22 Pacific Reporter, 159. The case involved the validity of a tax on agricultural lands for city purposes, and the tax was declared void. In that case Zane, Ch. J., in delivering the opinion of the court, said that "taxation for city purposes should be within the bounds indicated by its buildings or streets or alleys or other public improvements and contiguous or adjacent districts so situated as to authorize a reasonable expectation that they will be benefitted by the improvements of the city or protected by its police; that no outside districts should be included when it is apparent and palpable that the benefits of the city to it will be only such as will be re-

ceived by other districts not included—such as will be common to all neighboring communities."

We see no reason to doubt the correctness of that decision, and as it is decisive of the point involved in this case the judgment of the district court is affirmed.

We concur.

(Signed) BLACKBURN, *J.*
" MINER, *J.*

Endorsed on back: Title court & cause. Opinion. Filed February 4, 1891.

17 Know all men by these presents that we, James H. Larkins and Hyrum Stewart, residents and freeholders in the county of Davis, Territory of Utah, are held and firmly bound unto Ephr*i*am P. Ellison in the full and just sum of five hundred ($500) dollars, to be paid to the said Ephraim P. Ellison or his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the January term of the supreme court of Utah Territory, in a suit depending in said court between the said Ephraim P. Ellison, as respondent therein, and James H. Linford, appellant therein, judgment was rendered against the said James H. Linford and in favor of the said Ephr*i*am P. Ellison, and the said James H. Linford having prayed for and obtained the allowance of an appeal in open court, and the bond upon said appeal, to act as a supersedeas, having been fixed by order of the supreme court of Utah Territory at the sum of five hundred dollars:

Now, the condition of the above obligation is such that if the said James H. Linford shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said appeal and plea good, then the above obligation to be void; else to remain in full force and virtue.

J. H. LARKINS. [SEAL.]
HYRUM STEWART. [SEAL.]

Sealed and delivered in presence of—
THOMAS H. PHILLIPS.
CHRISTOPHER BURTON, JR.

18 TERRITORY OF UTAH, } ss:
County of Davis, }

James H. Larkins and Hyrum Stewart, being duly sworn, each for himself says: "I am worth the amount specified in the foregoing undertaking as the penalty thereof over and above all my just debts and liabilities and exclusive of property exempt from execution. I am also a householder and freeholder in the said county."

J. H. LARKINS.
HYRUM STEWART.

Subscribed and sworn to before me this eleventh day of February, 1891.

[SEAL.] THOMAS H. PHILLIPS,
Notary Public.

Approved by C. S. Zane, chief justice supreme court.

C. S. ZANE,
Chief Justice, Utah Territory.

Endorsed on back: Title of court and cause. Bond on appeal. Filed Feb'y 12, 1891. Jas. P. Bache, clerk.

19 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of Ephraim P. Ellison, respondent, *vs.* James H. Linford, Jr., appellant, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond, and map, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and map is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 14th day of February, A. D. 1891, at Salt Lake City, Utah.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 14,489. Utah Territory supreme court. No. 387. James H. Linford, Jr., appellant, *vs.* Ephraim P. Ellison. Filed February 21, 1891.

Office Supreme Court U. S.
FILED.
MAR 31 1894
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

JAMES H LINFORD, JR., *Appellant,*
vs.
EPHRAIM P ELLISON, *Respondent.*
No. 387.

BRIEF FOR RESPONDENT.

JABEZ G. SUTHERLAND,
ARTHUR BROWN,
For Appellee.

Star Print, Salt Lake.

SUPREME COURT OF THE UNITED STATES.

JAMES H. LINFORD, Jr., *Appellant*,
vs.
EPHRAIM P. ELLISON, *Respondent*.
} No. 387.

MOTION TO DISMISS.

And now comes the said respondent Ephraim P. Ellison and moves to dismiss the appeal in this cause for the reason that this court has no jurisdiction to entertain the same. The right to appeal from the Supreme Court of the Territory of Utah is limited by the Statute, which reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.
>
> Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty, or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The right to appeal from the Supreme Court of a Territory is in many respects far more broad than the right to appeal from the Supreme Court of a State, but in some respects it is more limited. It would seem from this Statute, the mere raising of a

constitutional question does not give the right to appeal, unless that constitutional question goes so far into the power of the Territory as to draw in question an authority exercised under the United States. It seems clear that under the letter of this Statute this case does not fall within any one of these provisions; the amount was not $5000, but simply the sum of $50 for which we recovered judgment. No patent or copyright of the United States is involved; certainly there is no treaty. What is the meaning of the words "Authority exercised under the United States?" Does that mean the validity or invalidity of every act of the Legislature of Utah, or every power to tax by a city created by the Legislature of Utah? The power to tax is not an authority exercised under the United States, it is simply an authority in this case exercised by the City of Kaysville. Perhaps in a measure the validity of the acts of the Legislature of Utah, creating immense cities, is involved, as will be seen by an examination of the briefs upon the merits.

The respondent claims the tax is illegal and sues a collecting officer of the City of Kaysville. What is there about such a collection that can possibly raise any question as to the validity of an authority exercised under the United States.

We respectfully refer to the following cases:

Ex rel Frask vs. Wannamaker, 147 U. S., 149.

United States vs. Lynch, 137 U. S., 280-285.

Cook Co. vs. Calumet & Chi. Canal & D. Co., 138 U. S. 635-652.

Street vs. Ferry, 119 U. S., 385.

We submit that this case should be dismissed, and we refer to the entire briefs on both sides as showing the discussion, for the purpose of showing that there is no such question involved in this case as would bring it within that statute of appeal.

JABEZ G. SUTHERLAND,
ARTHUR BROWN,
For Respondent.

SUPREME COURT OF THE UNITED STATES.

JAMES H. LINFORD, JR., *Appellant*,
vs.
EPHRAIM P. ELLISON, *Respondent*.
No. 387.

BRIEF FOR RESPONDENT.

STATEMENT OF CASE.

The policy of the early settlers of Utah was to divide the larger part of that whole Territory into cities.

Great tracts of land were set apart, without being platted into blocks, and while only used as agricultural lands, they were called cities. Often connected with the city there would be a little nucleus or village in some part or corner of the tract and named. Among other such cities, the city of Kaysville was created in 1868. At the time this litigation began it contained about six hundred inhabitants. At the time it was organized in 1868 it probably contained fifty, although that is a mere matter of conjecture, and is not a matter of record.

The little nucleus of Kaysville, which would be everywhere else denominated a village, is divided into lots and blocks including four sections, but not covering any greater

area than one section, and all within one square mile, as it was organized a quarter of a century ago, and still continues, includes more than twenty-three square miles.

The property of the plaintiff is on the outer edge of this vast area. He receives no benefit whatever from the city government, which is conducted at the little nucleus village within limited boundaries. The city is mapped in the findings, and plaintiff's property on which the tax in question was levied, is described in the fourth finding as follows:

> "4th. That plaintiff owns the three tracts of land where his name appears on the map, and that they are agricultural lands, used for farming purposes only, and on which he resides, and that he also owns a store at the point indicated by the letters 'F. U.' and 'E. P. E.' at a little place called Layton; that one of said tracts of land is situated a little over half a mile from the nearest part of the platted portion of the city. The second tract is situated about one mile and the third tract about two miles from the platted portion of the city, while the store is situated about two miles away, at a little place called Layton, on a county road leading to the city proper, and also on the line of the Utah Central Railroad."
>
> See also the Sixth Finding.

It is apparent from this statement of the findings and from the stipulation that the little village of Kaysville is attempting to exercise jurisdiction over another nucleus or village, called Layton, bounded in the same general limits called city. Layton must pay tribute to Kaysville.

These lands of the plaintiff below were so situated with reference to the "city" as occupied by its inhabitants; that it did not derive any benefit from the municipal government. It is not a populous city. Its growth in the past has been exceedingly small, and no great growth can be anticipated in the future. It seems absurd to organize such a community into a city and to connect with it an area of twenty-three square miles, at least

twenty of which can never be expected to be covered or benefited by it, and it is no less unjust than absurd, when it is apparent that this excessive area is put into the corporate limits, not to share the supposed benefits of a city government, but to contribute the larger part of the revenue to support it.

Ellison objected to doing it, his property was levied upon; he brought this action of trover against the city marshal, which was maintained in the District Court; was appealed to the Supreme Court of Utah, there affirmed, and is now pending in this court on the appeal of the taxing officer, to test the question involved.

BRIEF.

We complain of the taxation of the lands of the plaintiff below for municipal purposes, because,

First—It involves the taking of private property for public use without compensation.

Second—It is the imposition of a greater burden or charge on the owners of these outlying agricultural lands than are imposed on other agricultural lands under like circumstances.

This tax is void because it is within the prohibition of the fifth amendment of the Constitution of the United States, saying:

* * * "Nor shall private property be taken for public use without just compensation."

This amendment to the constitution is applicable to the Territory of Utah; we are protected by it and under it.

It is not a limitation upon the States; is not in the Constitution of the States unless re-enacted; and, if re-enacted as by a Constitutional State, would not be reviewable here.

The fact that our property is taken for a tax, shows that it must have been taken for public use, or it would be illegal for other reasons. It is private property that is being taken

for that public use. The respondent received no compensation whatsoever, because he is not a member of the community for whose benefit this tax is raised. The determination of the question as to whether the plaintiff received compensation at all or not was for the judiciary. If he received compensation at all, then it would be for the legislature. The judiciary will inquire, whenever this constitutional limitation is invoked, whether the facts exist which bring it within the case or not; that is, it is a matter of inquiry for courts and juries:

First—Whether private property is taken.

Second—Whether it is for public use; and,

Third—Whether it is for just compensation.

Hence none of these things can be predetermined by act of the legislature. If a tax is informal in any particular, or illegal in a matter of form; if the manner of the levy is insufficient, it might possibly be said to fall within the other clause of the constitution—that a person could not be deprived of property without due process of law. But so long as a tax is apparently regular upon its face, the defendant cannot call that provision of the constitution to his aid.

Kelly vs Pittsburgh, 104 U. S., 78.
Davidson vs. New Orleans, 96 U. S., 97.

But if a citizen is taxed in a community where he has no interest and therefor his taxation, though regular in fact, is illegal because he derives no benefit from it, then his private property is being taken for public use without any compensation.

Bradshaw vs. Omaha, 1 Neb. 16.
Covington vs. Southgate, 15 B. Monroe, 491.
Morford vs. Unger, 8 Iowa, 82.

The case of Kelly vs. Pittsburgh, and Davidson vs. New Orleans, above referred to, have no application to any suit arising under the fifth amendment. The fifth amendment does not apply to the State of Pennsylvania or to the State of Louisiana. Those were suits under the fourteenth amendment, which prohibits a State from depriving any person of property without due process of law. The Territories are entitled to protection under the fifth amendment as well, which, in addition to protecting the citizen against being deprived of property without due process of law, provides, as above stated, that his private property shall not be taken for public use without just compensation. Kelly, a citizen of Pennsylvania, could only appeal to the limitation, which was one upon the states. Neither that nor this is a case where a person is deprived of property without due process of law, because the formalities were complete. Taxation is one of the processes of law, and it is stipulated that as to the formalities it is all right, but no formality can permit the property of a citizen to be taken for public uses without payment. Ours has been so taken. We also refer to

Pomeroy on Mun. Law, Sec. 672.

Loan Association vs. Topeka, 20 Wall. 655.

It was argued in the court below that the City of Kaysville did not exercise the power of cities, but was merely an organization like a township or county. To meet that we add as an appendix to this brief the entire act creating the city.

By the tenth section of the act it thus appears that the council are to have the power to pass any law for the peace, benefit, good order, regulation, convenience and cleanliness of said city, and for the health and happiness of the inhabitants thereof. This gift of power is as broad as the delegation of power from Congress to the Territory itself. The effect was, that

in this and other like cities, the legislature being invested with the general power of the Territory, redelegated the same power. No city could have a greater grant than that contained in this charter. What power is to-day exercised by the great cities of the Union that is not within the broad clause which we here quote. It is not a power usually given to townships or to counties. A township itself, it is true, may exercise large authority, but the scope is very limited, while this city can enact any ordinance which it may deem best for the happiness of the inhabitants, might pass a law as to marriage or any other thing under the letter of that grant.

"Taxation is the enforcement of a proportional contribution to discharge a public burden from those who ought to bear it."

1 Cooly on Taxation, 1.

There are two requisities which import limitations of the power of taxation, and these inhere in the very nature of the power itself—first, that it extend and be limited to those who should bear the burden.

Matter of Washington Street, 69 Pa. St., 352-363.
Darach's App. 62 id. 491.
Hammett vs. Philadelphia, 65 id. 146-151.
Sharpless vs. Mayor, et al., 21 id. 108.
Ryerson vs. Utley, 16 Mich. 269.
State vs. Haben, 22 Wis. 660.
Cheaney vs. Hooser, 9 B. Mon. 341.
People vs. Salem, 20 Mich. 474.
Howell vs. Bristol, 8 Bush. 493.
Merrick vs. Amherst, 12 Allen, 504.
Dyar vs. Farmington Villlage Corporation, 70 Maine, 515.

The tax for the support of the state cannot be levied exclusively on a part of it, nor on a whole county to support a city which embraces in its actual boundaries only a small part of it.

In Ryerson vs. Utley, 16 Mich., 276, a tax was imposed on the commerce of one county to maintain a state improvement and held void.

Cooley, Ch. J., said:

> "The control of the state in regard to taxation is certainly very great, but it is by no means unlimited, and it cannot be exercised in an arbitrary manner, nor without regard to those principles of justice and equality on which it is based. It is of the essence of all taxation that it should compel the discharge of the burden by those upon whom it rests; and if the state should attempt to compel any single county by taxation to pay the salaries of the state officers, or the expenses of the legislature, no one would for a moment doubt that while the act was arbitrary, unjust and tyrannical, it was also unconstitutional."

In People vs. Salem, 20 Mich., 452, 474, the same distinguished jurist said:

> "It is not doubted by any one, that the power of the legislature to determine for what purposes taxes shall be levied, and what districts of territory and what classes of persons and property shall bear the burden is very broad, and it must be confessed that in describing or defining it words are sometimes employed by the courts which import an absolute and unlimited discretion, such as might exist in an irresponsible government, or in the people, if acting in their sovereign capacity, without any written constitution, and which consequently could not be brought to the test of any restrictive rules. For many purposes these broad and loose definitions of the power of taxation are not objectionable, but they cannot be regarded as careful and precise enough to be tests of constitutional authority, and whenever they are employed in the law, the modifications by familiar constitutional principles are always to be understood.

"I understand that, in order to render valid a burden imposed by the legislature under an exercise of the power of taxation, the following requisites must appear:

* * * * * * * *

"2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A state burden is not to be imposed upon any territory smaller than the whole state, nor a county burden upon a territory smaller or greater than the county. Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable."

It is not doubted and this court has held, that the legislature has a discretion to enlarge the boundaries of a city to include more territory.

Kelly vs. Pittsburgh, 104 U. S., 78.

So it is within its discretion to originally fix the corporate boundaries and thereby determine what property shall bear the burdens of municipal taxation. But this is not an "unlimited discretion such as might exist in an irresponsible government." "The modifications by familiar constitutional principles are always to be understood."

It is not within this discretion to require property situate beyond the reach of municipal benefits to contribute to the expense of the municipal government. A statute having that purpose in view would impose the burden on those who cannot be made to bear it—upon property upon which it does not justly nor equitably rest.

Can it be doubted that if a legislature to support a city of six hundred inhabitants, confined to a single section, should embrace in the corporate limits all the territory of a large agricul-

tural country, sparsely populated, a court would be justified in holding that the legislature had adopted a measure which transcended its discretion?

The intention of the legislature in organizing the City of Kaysville is palpably to subject exterior and unbenefited property to municipal taxation—property which on account of its remoteness the legislature had no discretion to include in the city limits to bear part of the burdens of the city government.

The seventh section of the Charter provides:

> "The city council shall have authority to levy and collect taxes for city purposes upon all taxable property, real and personal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce the payment of the same to be provided for by ordinance, not repugnant to the Constitution of the United States or to the Laws of this Territory."
>
> 1 C. L. of Utah, 429.

Where the owner of property so situated is taxed, his private property is taken and appropriated to public use without compensation. Such taxation cannot be sustained so long as the safeguards placed around the citizen by the fundamental law, are respected and upheld.

Howell vs. Bristol, 8 Bush., 499.

In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect, and if it is apparent that the object of the statute as judged by that criterion is to subject private property to unconstitutional exactions, it is void.

Henderson vs. Mayor of N. Y. 92 U. S., 268.

This court said in Yick Wo vs. Hopkins, 118 U. S. 369-370:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed

to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Dent vs. W. Va., 129 U. S., 124.
Loan Assn. vs. Topeka, 20 Wall., 663.
U. S. vs. Lee, 106 U. S., 196.

The legislature has a discretion to organize cities with such territory as is at the time, and will eventually be conveniently situated to be benefited by the city government, and therefore properly made to share in the burdens incident to it. But when the city is organized with such extended area that it is manifest that such a discretion has not been exercised or attempted to be exercised, the courts may protect the owners of land beyond the proper boundaries of the city from the unjust imposition of municipal taxes, under the constitutional guaranty that private property shall not be taken for public use without due compensation.

Bradshaw vs. Omaha, 1 Neb., 16.
Cheaney vs. Hooser, 9 B. Mon., 330.
Wells vs. Weston, 22 Mo., 385.
Covington vs. Southgate, 15 B. Mon., 491.
Sharps Ex. vs. Donovan, 17 id. 223.
Arbogast vs. Louisville, 2 Bush, 271.
Swift vs. Newport, 7 Bush, 37, 40.
Morford vs. Unger, 8 Iowa, 82.
Langworthy vs. Dubuque, 13 id. 86.
Fulton vs. Davenport, 17 id. 404.
Buell vs. Ball, 20 id. 282.
Deeds vs. Sanborn, 26 id. 419.
Dieman vs. Fort Madison, 30 id., 542.
Salt Lake City vs. Wagner, 2 Utah, 400.

2. The municipal tax in question for which the plaintiff

below derives no benefit, is a burden imposed on him beyond those imposed generally in the territory on owners of agricultural land; in fact, greater than is imposed on any other taxpayer, for the taxpayer who is properly taxed receives compensation in the accomplishment of the beneficent objects for which taxes are raised.

A law which imposes such unequal burdens is contrary to the fourteenth amendment to the Federal Constitution. That amendment protects all owners against such burdens. This effect of it has often been declared by this court.

Barber vs. Connolly, 113 U. S., 31.

Bells Gap R. R. Co. vs. Pennsylvania, 134 id. 238.

In County of Santa Clara vs. Southern Pac. R. R. Co., 18 Fed. Rep., 399, Mr. Justice Field said:

> "Unequal taxation, so far as it can be prevented, is therefore prohibited by the amendment. There undoubtedly are, and always will be more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result."

Railroad Tax Cases, 13 Fed. Rep., 722.

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For Appellee.

APPENDIX

KAYSVILLE.

§ 760. s. 1. All that district of country in Davis County embraced in the following boundaries, to-wit: Commencing at the southeast corner of the southwest quarter of section one, in township three north, range one west, thence north five miles to the northeast corner of the northwest quarter of section thirteen, township four north, range one west; thence west two and a half miles to the northwest corner of section fifteen, township four north, range one west; thence southwest to the northwest corner of section thirty-one, township four north, range one west, United States survey, Salt Lake meridian; thence south about three-fourths of a mile to the shore of Great Salt Lake; thence in a southeasterly direction along the shore of said lake about three miles to the precinct line between Farmington and Kaysville; thence northeasterly along said precinct line to where it intersects with the first sectional line south of the township line between townships three and four north, range one west; thence east to the place of beginning; shall be known and designated under the name and style of Kaysville City; and the inhabitants thereof are hereby constituted a body corporate and politic by the name aforesaid, and may have and use a common seal which they may change and alter at pleasure.

§ 761. s. 2. The inhabitants of said city, by the name and style aforesaid, shall have power to sue and be sued, to plead and be impleaded, defend and be defended in all courts of law and equity and in all actions whatsoever; to purchase, receive and hold property, real and personal, in said city; to purchase, receive and hold real property beyond the city for burying grounds and other public purposes for the use of the inhabitants of said city; to sell, lease, convey or dispose of property, real and personal, for the benefit of said city; to improve and protect such property, and to do all other things in relation thereto as natural persons.

§ 762. s. 3. There shall be a city council, to consist of a mayor and five councilors, who shall have the qualifications of electors of said city, and shall be chosen by the qualified voters thereof, and shall hold their offices for two years and until their successors shall be elected and qualified. The city council shall judge of the qualifications, elections and returns of their own members, and a majority of them shall form a quorum to do business; but a smaller number may adjourn from day to day and compel the attendance of absent members, under such penalties as may be prescribed by ordinance; there shall also be elected in like manner two justices of the peace who shall have the qualifications of voters, be commissioned by the Governor, and have jurisdiction in all cases arising under the ordinances of the city.

§ 763. s. 4. The mayor and councilors, before entering upon the duties of their offices shall take and subscribe an oath or affirmation that they will support the Constitution of the United States and the laws of this Territory, and that they will well and truly perform all the duties of their offices to the best of their skill and abilities.

§ 764. s. 5. One mayor and five councilors shall be elected biennially, and the first election under this act shall shall be at such time in said city as the probate judge of Davis County shall direct; *Provided*, said election shall be on or before the first Monday in August next. Said election shall be held and conducted as now is provided by law for the holding of elections for county and Territorial officers; and at the said first election all electors within said city limits shall be entitled to vote.

§ 765. s. 6. The clerks of election shall leave with each person elected, or at his usual place of residence, within five days after the election, a written notice of his election; and each person so notified shall, within ten days after the election, take the oath or affirmation hereinbefore mentioned, a certificate of which oath shall be deposited with the recorder, and be by him preserved; and all subsequent elections shall be held, conducted and returns thereof made as may be provided for by ordinance of the city council.

§ 766. s. 7. The city council shall have authority to levy and collect taxes, for city purposes, upon all taxable property, real and personal, within the limits of the city, not exceeding one-half of one per

cent. per annum upon the assessed value thereof; and may enforce the payment of the same to be provided for by ordinance, not repugnant to the Constitution of the United States or to the laws of this Territory.

§ 767 s. 8. The city council shall have power to appoint a supervisor of streets. They shall also have the power to appoint all such other officers by ordinance as may be necessary, define the duties of all city officers and remove them from office at pleasure.

§ 768. s 9. The city council shall have power to require of all officers, appointed in pursuance of this act, bonds with security for the faithful performance of their respective duties, and also to require of all officers appointed as aforesaid, to take an oath for the faithful performance of the duties of their respective offices.

§ 769. s. 10. The city council shall have power and authority to make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or the laws of this Territory, as they may deem necessary for the peace, benefit, good order, regulation, convenience and cleanliness of said city; for the protection of property therein from destruction by fire or otherwise, and for the health and happiness of the inhabitants thereof; and shall have control of the water and water courses leading to the city: *Provided*, That such control shall not be exercised to the injury of any rights already acquired by actual settlers thereon; and shall have control of the water courses and mill privileges within said city; but in no case shall they interfere with the natural rights of others heretofore acquired in relation to water They shall have the power to fill all vacancies that may happen by death, resignation, removal, or otherwise, of any of the officers herein made elective; to fix and establish the fees of the officers of said corporation. The city council shall have power to divide the city into wards and specify the boundaries thereof.

§ 770. s. 11. All ordinances passed by the city council shall, within ten days after they shall have been passed, be published in some newspaper printed in said city, or certified copies thereof be posted up in three of the most public places in the city. They shall not be in force until thus published or posted up.

§ 771. s. 12. All ordinances of the ctiy may be proven by the seal of corporation affixed thereto; and when printed or published in

book or pamphlet form, purporting to be printed or published by the authority of the corporation, the same shall be received in evidence in all courts and places, without further proof.

§ 772. s. 13. The justices of the peace of said city shall have all the powers of other justices of the peace, both in civil and criminal cases arising under the laws of the Territory; they shall perform the same duties, be governed by the same laws, and give the same bonds and securities as other justices of the peace; they shall have exclusive jurisdiction in all cases arising under the ordinances of the corporation and shall issue such process as may be necessary to carry such ordinances into execution. Appeals may be had from any decision or judgment of said justices, arising under the ordinances of said city or the laws of the Territory, in the same manner as appeals are or may be taken from other justices of the peace.

§ 773. s. 14. The mayor shall be the chief executive officer of said corporation; he shall preside in the city council, and shall have power to veto any ordinance when not passed by four-fifths majority; and it shall be his duty to sign all city ordinances.

§ 774. s. 15. The city council shall have power to restrain, regulate or prohibit the running at large of cattle, horses, mules, sheep, swine, goats, and all kinds of poultry; and to authorize the distraining, impounding or sale of the same for the penalty and costs incurred thereby, and to impose penalties for any violation of city ordinance in relation thereto; and to tax, regulate or prevent the keeping of dogs, and to authorize the destruction of the same when at large contrary to city ordinance; *Provided*, That the proceeds of such sale shall be paid into the county treasury of the county, less the amount of cost and expenses incurred in distraining, impounding and selling the same, to be used as provided for in Section 408 of the Compiled Laws of Utah; and that such costs and expenses shall not exceed those provided for in Section 413, Compiled Laws of Utah, for similar services.

§ 775. s. 16. To license, regulate, prohibit or restrain the manufacturing, selling or giving away of spirituous, vinous or fermented liquors, [to license and regulate] tavern keepers, dram or tippling shop keepers, boarding, victualing or coffee houses, restaurants, saloons or other houses or places for the selling or giving away of ardent, vinous or fermented liquors.

§ 776. s. 17. The city council shall have exclusive power by ordinance to regulate the police of the city; to license, tax and regulate auctioneers, merchants and retailers; to license, tax and regulate theatrical and other exhibitions, shows and amusements; to prohibit and suppress gaming, bawdy and other disorderly houses.

§ 777. s. 18. This act shall be in force on and after the fifteenth day of March, 1868, and may be amended or repealed at the pleasure of the Legislative Assembly.

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IN THE SUPREME COURT

OF THE UNITED STATES.

JAMES H. LINFORD, JR., *Appellant*,
vs.
EPHRIAM P. ELLISON, *Appellee*.

90

APPELLANT'S BRIEF.

J. L. RAWLINS,
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Attorney for Appellee.

ACKERMAN & CO., PRINTERS, SALT LAKE.

IN THE SUPREME COURT

OF THE UNITED STATES.

JAMES H. LINFORD, JR., *Appellant*,
vs.
EPHRIAM P. ELLISON, *Appellee*.

STATEMENT OF CASE.

The plaintiff, Ellison, in 1889, was the owner of certain real and personal property, situated within the corporate limits of the town of Kaysville, as shown upon the map marked Exhibit "1."

The tax was levied upon this property for the corporate purposes of said town, and the payment thereof being refused, the property described in the complaint was levied upon and sold to secure the payment of the taxes. If the property of the plaintiff, situated as it was, was taxable by the City of Kaysville, then the judgment of the lower court should be reversed; if not so taxable, then that judgment should be affirmed.

It is contended that the judgment of the lower court is erroneous and should be reversed.

BRIEF OF ARGUMENT.

The contention of the plaintiff is that his property was not taxable, because, being situated at some distance from the more thickly settled portion of Kaysville, it receives no benefit by the expenditure of the money derived from such taxation. That the Charter enacted by the Territorial Legislature, defining the boundaries of Kaysville and authorizing the tax, is void, first, because unreasonable, and second, because in violation of the Fifth Amendment of the Constitution, which provides that "private property shall not be taken for public use without just compensation."

The Charter of the City of Kaysville was passed February 13, 1868. It must have been reported to Congress, but has never been revoked or annulled by that body.

1 Compiled Laws Utah, 429.

Section 1 of this Charter defines the corporate boundaries of Kaysville. Section 7 expressly authorizes the city to levy a tax upon all the property within the city limits for city purposes. The city purposes or objects, to effectuate which these taxes are authorized, are: To carry out such ordinances not repugnant to the Constitution which may be passed to secure the peace, benefit, good order, regulation, etc., of the corporation; to protect property from fire or otherwise; for the health and happiness of the inhabitants, and to control the water and water courses leading to the city (Section 10); to restrain the running at large of animals, etc. (Section 15); to regulate and prohibit the sale of intoxicating liquors; to suppress gaming and disorderly houses,

and to provide reasonable compensation to such officers as are authorized by the Charter.

1 Compiled Laws Utah, 427.

It cannot be said that the plaintiff or his property receives no benefit from the expenditure of the taxes for these purposes. The plaintiff, like all other inhabitants, is certainly interested in the preservation of the peace and good order of this district, called a city. His lands required irrigation, and the control of the water and water courses in the city are as much for his benefit as that of any of the other inhabitants. By the regulation or prohibition of the liquor traffic, he is benefitted by being relieved in common with the rest of the community from the evil consequences flowing therefrom. The restraining of animals may be as much for his benefit as for the benefit of the people living in the more thickly settled portion of the town. In fact, while called a city, this Charter simply created a municipal subdivision and delegated to it certain limited powers of government to preserve the peace; provide for the sobriety; restrain animals and distribute the waters for the benefit of all the inhabitants within the district. Any one of these powers, or all of them, might have been conferred upon a county or precinct, and said county or precinct might have been authorized to levy a tax upon all the property within it for the purpose of carrying them into effect.

The Court must look at the substance, and not at the name, and unless it is prepared to hold that the Territorial Legislature has no power to create a county and vest it with

such powers as have been conferred upon Kaysville, it must affirm the validity of this legislation.

By the organic act, the Territorial Legislature is vested with power to legislate upon "all rightful subjects of legislation." Such legislation must be consistent with the Constitution and laws of the United States.

The only limitation upon the power to tax contained in the organic act is to the effect: "That no tax shall be imposed upon the property of the United States, nor shall the lands and other property of non-residents be taxed higher than the lands and other property of residents." It is also provided "that all laws passed by the Legislative Assembly shall be submitted to Congress, and if disapproved shall be null and of no effect."

1 Compiled Laws Utah, 43.

Mr. Justice Field, in Maynard vs. Hill, 125 United States, 204, says: "What were rightful subjects of legislation when these acts organizing the Territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid because upon a careful consideration of

their character doubts may arise as to the competency of the legislature to pass them."

The creation of a municipal corporation, the fixing of its boundaries and conferring the power on it to tax all property within the limits thus fixed, are among the most usual and ordinary subjects of legislation, and are clearly rightful within the sense of that term as used in the organic act.

1 Dillon Mun. Corp., Sec. 38, and authorities cited in note.

University vs. Indiana, 14 Howard, 268.

Root vs. Shields Woolworth, C. C. Rep., 304, 356 and 350.

Kelly vs. Pittsburg, 104 U. S., 80 and 81.

Spencer vs. Martin, 125 U. S., 355.

United States vs. New Orleans, 98 U. S., 392.

Davidson vs. New Orleans, 96 U. S., 107.

11 Dillon Mun. Corp., 736, 740.

Mr. Justice Miller, in Kelly vs. Pittsburg, page 80, says: "It is not denied that the Legislature could rightfully enlarge the boundary of the City of Pittsburg so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a town-

ship organization, is one of the most usual and ordinary subjects of State legislation."

The enactment of the Charter of Kaysville was therefore clearly within the power of the Legislature. Can the courts declare it an unreasonable exercise of the power, or can it say judicially that the plaintiff received no benefit from the city organization?

Justice Miller in the last case referred to, on page 32 says: "We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do penetrate his farm, lead to it. The water works will probably reach him some day, and may be near enough now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. The officers, whose duty it is to punish and prevent crime, are paid out of the taxes. Has he no interest in maintaining them because he lives further from the court house or police station that some others?"

"Clearly, however, these are matters of detail within the discretion, and therefore, the power, of the law-making body within whose jurisdiction the parties live."

If an act of the Territorial Legislature within its acknowledged power is unreasonable, the remedy pointed out in the organic act is to procure a revocation of it by Congress. With this matter the courts have nothing to do.

1 Desty on Taxation, 722.

In no case, except that of the Territory vs. Daniels, has

it ever been intimated that the courts possessed such power. The Supreme Court of the United States has distinctly held the contrary.

Maynard vs. Hill, 125 U. S., 190, 209.
Clinton vs. Englebretch, 13th.
Wallace, 434.

In Maynard vs. Hill, the court was applied to to declare void an act of the Territorial Legislature of Oregon, granting a divorce.

Mr. Justice Field in that case, on page 20, says: "The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and if the facts stated had been brought to the attention of Congress, that body might, and probably would, have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing on the question of the existence or absence of power in the Assembly to pass the act." If there ever were circumstances authorizing the court to declare an act of the legislature unreasonable and void, it existed in that case. Yet the Supreme Court did not for a moment consider that it possessed this power. When it found that the act was within the general

scope of the powers conferred upon the legislature, it considered that its province in the matter ended.

The acts of the Territorial Legislature are statutes, and not simply by-laws or ordinances. Courts take judicial notice of them. In every case that arises under a Territorial Statute, the proceeding cannot be arrested and an inquiry instituted into the question of the reasonableness or unreasonableness of the statute, as may be done in respect to a mere by-law passed pursuant to an incidental or implied power of a municipal corporation. Even if the Territory is to be regarded in all respects like a city or town, and its statutes as mere by-laws or ordinances, still, under the power conferred by the organic act, the legislation in question could not be held unreasonable. The rule is thus stated in 1 Dillon Mun. Corp., Sec. 94: "Thus where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts."

See Dillon Mun. Corp., Sec. 94 and 95, and authorities cited in notes.

The next inquiry involves the question as to whether this charter and tax violates the Fifth Amendment of the Constitution, "that private property shall not be taken for public use without just compensation." This provision has been almost universally held to be a restriction only upon the powers of eminent domain, and not upon that of taxation.

2 Dillon Mun. Corp., Sec. 738.
Hare Am. Con. Law, 332.
Davidson vs. Mg. Co., 113 U. S., 8.

Mr. Justice Gray, in the last case, says (speaking of the above provision in the Constitution): "It is true that this article regards the right of eminent domain, and not the right to tax; for the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes."

If it were held that this provision was a restriction upon the power of taxation, no valid tax could be levied, because, before the tax upon any individual could be collected, he must have received a just compensation therefor. That means adequate compensation. He is entitled then and there to receive its entire value. It will at once be perceived that adjustment of the taxes could never be made under the operation of such a rule.

If it be only held that the taxpayer must receive some benefit, that is a matter exclusively within the legislative discretion to determine. Cooley on taxation, page 179 says: "Whatever the rule of apportionment that is thus established by legislation, it is presumptively as just and equal in the opinion of the legislature as the circumstances would permit. It is not to be questioned for impolicy, and cannot be overthrown by showing that in particular instances it operates unjustly."

See also Cooley on Taxation, 108-113-120.

This learned author, speaking with reference to the anomalous decisions in Kentucky and Iowa (page 120), says: "1. They do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public; but they leave the legislation to stand, and only to interfere to qualify its effect on the ground that it has been adopted on improper grounds and will operate unequally. 2. This is done on an inquiry into the facts, and a substitution of a judicial conclusion for the legislative on a subject not at all judicial; a subject too—the proper limits of city extention—upon which persons are certain to differ widely, and where an inquiry into the facts after the judicial method of an examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or to make."

If an inquiry can be made into the justice of one tax, authorized by the legislature, it may into all taxes, and the validity of each particular tax upon each particular piece of property must be submitted to a jury upon such evidence as may be offered. Thus one tax might be held valid and another invalid under circumstances precisely similar, according to the varying notions of the jury, and thus the possibility of uniform taxation be utterly destroyed.

It is submitted that the judgment of the lower court in this case should be reversed, and the validity of the tax in question affirmed.

ARGUMENT ON MOTION TO DISMISS.

It is contended by the Appellee that this court has no jurisdiction of this appeal. The Appellant contends that this case is appealable from the Territorial Supreme Court to this court under the following provision of the Act of March 3d, 1885, that such an appeal may be taken when there is "involved the validity of any patent or copyright, or in which is drawn in question the validity of any treaty or statute of or authority exercised under the United States" without regard to the sum or value in dispute. The Territorial Legislature by statute created a municipal corporation of Kaysville City, defined its boundary and authorized it to levy and collect taxes upon all property within the boundaries thus defined.

It is contended by the Appellee that this was not the valid exercise of authority on the part of the legislature under the Constitution and laws of the United States and it was so decided by the lower courts. And the question of the validity of such exercise of authority is now the very question to be determined by this court. Hence it follows that this court should entertain jurisdiction to make decision of this question.

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